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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 45

SALVATORE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

SALVATORE PANICO,

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—v.—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Salvatore Panico prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 14, 1962.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed as an appendix to this petition, is reported in 308 F. 2d 125.

Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1962 (printed in the appendix to this petition). A timely petition for rehearing (filed September 26, 1962) was entertained by the Court of Appeals, and was denied by that Court on October 3, 1962. The petition for rehearing having requested rehearing by the Court of Appeals *in banc*, such petition for rehearing *in banc* was denied by order of October 10, 1962. By order dated October 29, 1962, Mr. Justice Harlan extended the time for filing a petition for a writ or certiorari in this case to and including December 2, 1962 (the latter date falls on a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Utilizing the summary procedures of Rule 42(a), F. R. Cr. P., the District Court convicted petitioner of criminal contempt of Court for his conduct during a lengthy criminal prosecution in which petitioner was one of numerous defendants. Petitioner was sentenced to fifteen months imprisonment for the alleged contempt. It was urged on behalf of petitioner that he could not have harbored the requisite criminally contemptuous intent because he was insane. The questions presented are:

1. Was it error to cite and to convict petitioner under the summary contempt procedure of Rule 42(a), F. R. Cr. P., instead of affording to him the protections of a proceeding under Rule 42(b) in which he could have had a trial (before

another Judge if he so desired) of the issue of his mental capacity to form the requisite criminal intent?

2. Even under the Rule 42(a) procedure, does the record herein require reversal of the conviction in view of the proofs as to petitioner's mental condition?

3. Do the relevant time sequences of the allegedly contemptuous acts, the obtaining of the proofs of petitioner's mental condition, and the subsequent sentencing for contempt (at the conclusion of the main criminal trial itself), plus the proofs pointing to petitioner's progressively worsening mental condition (which became one of adjudicatedly declared schizophrenia soon after the sentencing), give rise to the distinct aggrievement that the sentencing of petitioner for contempt was the sentencing of a person who then and there, at the time of such sentencing, was insane?

4. Was petitioner denied due process of law by being cited, convicted and sentenced for criminal contempt in the circumstances depicted in our preceding questions?

Constitutional Provisions, Statues and Rules Involved

The case involves the Fifth Amendment of the Constitution of the United States (due process of law); 18 U.S.C. §401; and Rules 42(a) and 42(b) of the Federal Rules of Criminal Procedure. The statute and Rules are printed as an appendix to this petition.

Statement of the Case

1. Preliminary Statement: Petitioner's Request to Reserve Opportunity to Move for Leave to File Amended or Substituted Petition Owing to Present Unavailability of Certain Collateral Record Items.

As appears in more detail in our "Statement of the Proceedings," *infra*, the judgment as to which this petition for certiorari seeks review—the judgment of the Court of Appeals for the Second Circuit affirming petitioner's conviction for contempt—rests upon a formal appellate record of such a nature that, unless certain collateral items are considered along with it, meaningful judicial review thereof is not possible. The papers which have been certified to this Court by the Clerk of the Court of Appeals as composing the original record in that Court with respect to the instant contempt proceedings happen to be only skeletal in coverage. This skeletal certified record does not include any printed appendix of any of the proceedings in the District Court relating to the contempt, inasmuch as the usual printed appendix on appeal was not filed by any of the parties, the appeal in the Court below having been handled on a highly expedited basis because the companion contempt sentences imposed by the District Court on several of the instant petitioner's co-defendants in the criminal prosecution in which these contempts arose were sentences of short duration which were already being served while the appeal below was pending. A further unusual feature is that the trial minutes of the criminal prosecution in which the alleged contempts arose were never made a formal part of the contempt-appeal record in the Court of Appeals, although, as will appear, those minutes and relevant exhibits must at some point have been available to the Court of Appeals, at least in connection with the appeal of

the instant petitioner Salvatore Panico if not in the appeals of his co-defendants in the contempt proceedings. The minutes of the criminal trial in which the alleged contempts arose—it was a narcotics prosecution—did not formally become part of the record in the contempt appeals in the Court below for the reason (seemingly) that the criminal proceedings as such (the narcotics case) were still pending in the District Court at the time when the contempt appeals were instituted in the Court of Appeals. In any event, those narcotics trial minutes and exhibits, we are advised by the Clerk of the Court of Appeals, did not become a formal part of the record in the contempt appeals in the latter Court, and the certified papers which have been supplied to us by the Clerk of the Court of Appeals for filing in this Court in connection with the instant petition indicate the same thing. In fact, even the District Court's citation or certificate of contempt had to be requested by us from the Clerk of the Court of Appeals to be certified to this Court as a distinct item because it was not a formal part of the record in the contempt appeal below (having been made available to the Court of Appeals as an exhibit annexed to the Government's brief in the contempt appeals).

The question will naturally occur to this Court as to why we have not nevertheless, at this later time, seen to it that our filing of the relevant record items in connection with the instant petition for certiorari should include the trial record in the narcotics case as a whole. We tried to do just this, but, as of the time of the filing of this petition for certiorari, it has proved to be impossible for the following reasons: Appeals from the narcotics trial convictions as such are presently pending in the Court below on behalf

of the numerous defendants in that trial (including the instant petitioner). The trial record of that narcotics case, consisting of approximately 8,000 pages of testimony and several hundred exhibits (plus many hundreds of pages of other proceedings) is being held in the office of the Clerk of the Court below to take care of the necessities of the numerous attorneys of the appellants in the narcotics case. Without burdening this Court as to the details of the administrative difficulties, suffice it to say that, in discussions which we have had with the Clerk of the Court of Appeals, it was settled upon as the advisable course that we should file in this Court, in connection with the instant petition for certiorari, the certified record papers which we are herewith filing (see description *infra*), and that we should explain to this Court the condition of affairs in regard to the record and exhibits in the narcotics trial (as we are herein doing). As regards those exhibits, furthermore, it is to be noted that many of them have been ordered sealed by the District Court, and that several of those exhibits which are most important for the consideration of the instant petition for certiorari (including both sealed and unsealed exhibits) are also important for the pending appeals in the Court below from the narcotics case convictions of not only the instant petitioner but also all of the other appellants, inasmuch as the mentally questionable conduct of the instant petitioner during the narcotics trial is believed to present serious issues of fair trial in the narcotics case appeals of the co-defendants.

The above described difficulties were recited to some extent in the application which we recently presented to Mr. Justice Harlan for an extension of time within which to file this petition for certiorari. Those difficulties con-

tinue unresolved at this time, and since we have already received one extension of thirty days within which to file this petition we have been obliged to proceed with such filing at this time, relying on the fact above mentioned that the record which we are filing herein on the strength of the certification made by the Clerk of the Court of Appeals is the formally complete record in the Court below.

The Court below has ordered that the argument of the appeals in the narcotics case shall be had during the week of January 28, 1963. Petitioner intends to proceed with the filing in this Court of the record of the narcotics trial (including the relevant medical exhibits) as soon as such become available, or, of course, at any other time which this Court may direct. After such further filing shall have occurred, or if it should turn out that this certiorari proceeding is to proceed to a final disposition without awaiting such further filing, petitioner may wish to request leave of this Court to file an amended or substituted petition for certiorari or a supplement to the instant petition, and petitioner hereby respectfully requests the right to reserve opportunity to do so.

In addition to filing herewith the record of petitioner's contempt appeal in the Court below which has been certified by the Clerk of that Court, and the previously mentioned citation or certificate of contempt filed by the District Court, we are also filing herewith the following certified record items: the certified record of the proceedings in the Court below in Docket No. 27613, which was an original proceeding for mandamus brought by the instant petitioner against United States District Judge Lloyd F. MacMahon (the docket number of the proceedings in the Court below in the

contempt appeal as such is No. 27667); and a certified exhibit consisting of typewritten excerpts from the minutes of the narcotics trial, which excerpts were originally filed in the Court below in support of petitioner's above mentioned application for mandamus, and were subsequently considered by the Court below also in disposing of petitioner's appeal from the contempt conviction which is herein sought to be reviewed. Also, in the appendix to this petition (pp. 15a *et seq., infra*), we print copies of correspondence relating to petitioner's mental condition which were submitted to and considered by the Court below in the instant contempt appeal. And, to recapitulate, the collateral record items which we are unable as aforesaid to file at this time consist of the complete record of the narcotics trial (bearing the file number "60 Cr. 436" in the District Court, and Docket No. 27733 in the appeal from the narcotics convictions in the Court below), as well as the following numbered "Court Exhibits" in the narcotics trial which are relevant to petitioner's mental condition, namely, numbers 139, 140, 141, 142, 146 (sealed), 147 (sealed), 149, 150, 150A, 150B, 187, 205.

2. The Proceedings Below.

(Because we anticipate, as above stated, that this petition may be amended, substituted or supplemented when the complete record materials of the narcotics trial (in which the instant alleged contempts arose) become available for filing in this Court, our following statement of the facts and proceedings below does not aim at presenting all of the relevant facts or all of the relevant citations to the record.)

The judgment sought to be reviewed is that of the Court of Appeals for the Second Circuit, affirming, by a divided Court (Circuit Judge Friendly, dissenting), an order of the District Court for the Southern District of New York (Lloyd F. MacMahon, District Judge), which sentenced the instant petitioner, a defendant in a narcotics prosecution, for contempt of court. The sentence was fifteen months, to be served at the expiration of certain other sentences.

The allegedly contemptuous conduct of the petitioner which resulted in his conviction for contempt consisted of outbursts in the courtroom during the trial of the narcotics case before Judge MacMahon. In the Court of Appeals it was urged on behalf of this petitioner, as being the dispositive issue, that petitioner was insane at the time of those outbursts, as well as at the time of his sentencing for contempt. Judge MacMahon had concluded, in his certificate pursuant to the Rule 42(a) procedure used by him in this contempt proceeding, that petitioner was not insane. The majority and minority opinions in the Court of Appeals disagreed as to the propriety of the use of the summary procedures of Rule 42(a), Judge Friendly in dissent saying that the procedures of Rule 42(b), which requires notice and hearing (and the participation of another Judge at the option of the defendant), should have been used in this case. The gravity of the factual-medical issues which were resolved by Judge MacMahon under the summary procedures of Rule 42(a) is evidenced by the differing ways in which the majority and minority opinions, respectively, of the Court of Appeals treated those questions.

Petitioner's outbursts in the narcotics trial which gave rise to the contempt proceedings were of an extreme nature.

In the first of the more serious outbursts, on May 23, 1962, petitioner physically charged into the jury box, screaming incoherencies and obscenities (Tr. 5638 et seq.).* After additional outbursts on the two succeeding days (May 24 and 25, 1962), the Trial Court conducted a hearing as to petitioner's mental competency to continue to stand trial pursuant to 18 U.S.C. §4244. The testimony of the psychiatrists at that hearing put in at least very serious doubt petitioner's capacity to continue to stand trial as a sane person (see details, *infra*, and the summary of the testimony in Judge Friendly's dissenting opinion in the Court below, appendix, *infra*). Nevertheless Judge MacMahon concluded that petitioner was able to stand trial. Thereafter petitioner, under order of Judge MacMahon was gagged, shackled and bound to his chair while present in the courtroom during the trial. One of the psychiatrists who had testified at the hearing on May 29, 1962, Dr. Theodore S. Weiss, senior psychiatrist of the Prison Ward, Bellevue, Department of Hospitals, had stated (see details, *infra*) that the petitioner's condition was one which would probably worsen unless the pressures upon him were eased. Instead, those pressures were intensified by the gagging, and shackling. Under these pressures, it then came about that on June 7 and June 8, 1962, the petitioner made attempts at suicide. Early in the morning hours of June 7, the petitioner hanged himself in his cell while his cell mates were asleep; he was cut down before the suicide could be effected. On the next night, in the early morning hours (June 8), the petitioner cut his wrists and arms in four-

* "Tr." refers to the trial minutes in the narcotics trial (not yet available for filing herein). See also the previously mentioned contempt citation or certificate, and the typewritten excerpts, both of which are filed with this petition.

teen places with a razor, lost more than 200 centimeters of blood and required 50 sutures. After these two suicide attempts, and upon further advice from Dr. Weiss, and upon petitioner's attorneys finding that they could not communicate with petitioner's mind at all, the attorneys for petitioner renewed their application before Judge MacMahon for a hearing on the petitioner's mental competency to continue to stand trial. This latter application on behalf of petitioner, made on June 13, 1962, was summarily denied by Judge MacMahon without conducting the preliminary psychiatric examination mentioned in 18 U.S.C. §4244. Thereupon petitioner's attorneys applied to the Court of Appeals for a writ of mandamus to compel Judge MacMahon to conduct such a renewed preliminary psychiatric examination, and the Court of Appeals granted such writ of mandamus (see certified record of mandamus proceeding filed herewith).

Before reciting the developments which followed that mandamus, we pause to note in more detail the circumstances of petitioner's abnormal conduct during the narcotics trial, and the Trial Judge's attitude concerning it.

The Trial Court had persistently refused to appoint a qualified psychiatrist to examine petitioner (Tr. 5679, 5723, 5873, 5893). The Court's reluctance to appoint a qualified psychiatrist to examine petitioner in accordance with 18 U.S.C. Sec. 4244 was shown, *inter alia*, by the comments made by that Court to the effect "that appellant's actions were taken right from the Aviles case, as though a script were written in that case" (Tr. 5661). The Court repeated his remarks on the Aviles case (Tr. 5873, Ex. pgs. 13-14). On the 25th of May, after petitioner had made an inculpatory outburst concerning a co-defendant, the Court in the pres-

ence of the jury (after denying a motion for a mistrial) said: "The Court: Your motion for a mistrial is denied, Mr. Krieger. Mr. Krieger, it is obviously a putup job" (Tr. 5889). Upon the request of petitioner's counsel that a doctor be called, the Court stated, "If the doctor is here, he will examine him. There is nothing wrong with him" (Tr. 5893).

The Court had finally (May 25) appointed a qualified psychiatrist, Dr. Arnett, to examine petitioner. This examination took place within a few hours after the Court had stated that petitioner's actions were a put-up job and that there was nothing wrong with him. Dr. Arnett's examination disclosed that petitioner had developed a paranoid state with psychosis and that he was not capable of undergoing a trial at that point (Tr. 5906). Dr. Arnett further stated that petitioner would need a rest of one to two weeks (Tr. 5913); that as to the rational moments when petitioner could understand what was going on about him and consult with counsel, it was Doctor Arnett's opinion that petitioner would lose control of himself at least 75% of the time if not 100%; and that his symptoms were not consistent with faking (Tr. 5914-5917).

Even though Dr. Arnett advised prompt treatment, the Court, still preoccupied with the "Aviles" case, asked Dr. Arnett if his opinion would be altered if he were told that the petitioner had entered the jury box while the jury was there; had made accusatory statements about other defendants and had done the same thing that morning from the chair; would his (Dr. Arnett's) view change if he were told that it had been done before by others in other cases as a basis to provoke a mistrial? Dr. Arnett answered the Court's query by stating it would not change his opinion,

particularly since his examination automatically in legal cases like this is definitely oriented to look for signs of malingering (Tr. 5918).

The Court, instead of committing petitioner to Bellevue Hospital for observation and treatment, had him re-examined. On May 29th, the Government's Doctor, George H. Hyslop, testified that he had examined petitioner by asking questions and receiving answers; that in his opinion petitioner could confer with counsel in aid of his defense (Tr. 5968). However, Dr. Hyslop admitted that he did not know about petitioner's outbursts when he examined him. (Tr. 5975, 5977, 5983-5984). Dr. Hyslop also stated that petitioner was not malingering (Tr. 5968).

Dr. Arnett then was called again (May 29) by the Court and he stated that he had examined petitioner for one hour; that in his opinion petitioner was able to discuss the facts with his lawyer (Tr. 5998). On cross-examination, Dr. Arnett admitted that when he saw petitioner on May 25, he was suffering from a paranoic state with psychosis (Tr. 6002).

The defense then (May 29) called Dr. Theodore S. Weiss, the senior psychiatrist at Bellevue Hospital since 1940. Dr. Weiss concluded that appellant was suffering from a psychosis of the paranoid type, that the paranoid ideas were fixed, but reactive in character, meaning that they were most probably a reaction to the tensions of the courtroom procedures and the situation he found himself in. Appellant had definite ideas of reference, persecutory ideas and intermittent auditory hallucinations; his affect was tense, agitated at times and depressed and probably suicidal. On June 14, 1962 in a letter addressed to petitioner's counsel,

Mr. Aronne, Dr. Weiss stated, "In view of his (petitioner's) conduct and the increasing tension he has been under in the courtroom since my examination, I feel definitely that the psychosis is severe and deepening in character. In my opinion, he cannot adequately confer with counsel for his own defense." (Tr. 6021-6025; see letter of Dr. Weiss attached to the moving papers for a mandamus and printed in the Appendix, *infra*, p. 15a.)

As earlier mentioned there occurred on June 7 and June 8 the suicide attempts of the petitioner, and the subsequent mandamus proceedings. In obedience to the mandamus, the Trial Court had petitioner reexamined by Dr. Hyslop, on June 19. This "examination" occurred in the following manner: At 9:20 P.M., petitioner was taken from his cell in the courthouse to be examined by Dr. Hyslop in another part of the courthouse. He was returned to his cell at 9:55 P.M. At most this examination by Dr. Hyslop consumed one-half hour. Petitioner complained of a severe headache and the examination was adjourned to the following day during lunch hour. This examination was not had because Dr. Hyslop was in fear of his safety. The Trial Court had prepared several questions for Dr. Hyslop to answer. Three of these questions were: whether petitioner could confer with counsel for the preparation of his defense; whether he knew the nature and quality of his acts; whether he could distinguish between right and wrong. To the first question Dr. Hyslop stated he could not answer. As to the other two questions he could not state. Nevertheless, one day later, without the benefit of any additional examinations, Dr. Hyslop submitted to the Court a more detailed report and completely changed the answers he had previously given. (See sealed records impounded by the Trial Court.)

Although the Trial Court had stated on several occasions that he would give the petitioner a sanity hearing at the conclusion of the trial, he did not do so (Tr. 5723, 5873, 7430).

The last of the courtroom outbursts by the petitioner in the trial before Judge MacMahon which formed the basis of the adjudication of contempt occurred on June 15, 1962. The judgment and sentence of contempt occurred on June 26, 1962. Under date of August 28, 1962, while the appeal below was pending, the undersigned attorney for the petitioner wrote to the Clerk of the Court of Appeals advising that on August 22, 1962, petitioner had been committed to the Dannemora State Hospital, Dannemora, New York, by order of the County Judge of Westchester County, as being schizophrenic, such having been found upon examination by two State appointed psychiatrists who had confirmed this diagnosis as originally made by the psychiatrist at Sing Sing Prison on July 12, 1962. (See copies of correspondence printed in the Appendix, *infra*, pp. 17a-21a.) The majority opinion of the Court of Appeals does not refer to these facts concerning petitioner's post-sentence diagnosis and judicial commitment as a schizophrenic (Appendix, *infra*). The dissenting opinion of Judge Friendly does refer to these facts (*ibid.*).

(Notwithstanding the previously mentioned incomplete character of the record materials presently available for filing herein on the facts relating to petitioner's mental condition, this Court may obtain a fairly meaningful picture of the situation from the herewith filed certified typewritten excerpts which were originally submitted as an Exhibit in the mandamus proceeding in the Court below, and, as already suggested, from Circuit Judge Friendly's

dissenting opinion (Appendix, *infra*). We recall to the Court that there is also filed herewith a certified copy of the complete text of Judge MacMahon's citation or certificate of contempt.)

Reasons for Granting the Writ

Since we anticipate that an amended or substituted petition, in place of the instant one, may be filed at a future date (subject to leave of this Court), and since the dissenting opinion of Circuit Judge Friendly in the Court below (Appendix, *infra*, pp. 6a *et seq.*) contains an extended statement of the reasons why the opinion and judgment below are erroneous—a statement upon which it would be difficult for us to improve—we shall limit ourselves, in the instant petition, to a very brief statement of the reasons for granting the writ.

1. The important question of the fair administration of federal criminal justice which this record presents appears to be *de novo* and to call, therefore, for a decision by this Court to guide future federal criminal trials. That important question is, whether the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure are intrinsically applicable at all, either on the face of the language of the Rule itself or in terms of constitutional due process, where, as in this case, the question of the scienter of a person charged with criminal contempt committed *in facie curiae* becomes subject to be summarily determined by the trial judge even though the claim is made, indicatively supported by the record, that the person ac-

cused of contemptuous conduct was insane or otherwise mentally incapable of forming and acting upon such requisite criminal scienter or intent. Cf. *Cooke* v. *United States*, 267 U. S. 517. As may be surmised from the fact that neither the majority nor the dissenting opinion below cited any precedent directly touching upon this question, the question would appear to be (as we have suggested) a *de novo* one. Moreover, the severity of the contempt sentence imposed upon the instant petitioner (15 months) favors all the more strongly that this Court should interpose its corrective powers in the interests of justice.

2. Even if the summary procedure of Rule 42(a) was not erroneously invoked in this case, it is submitted that upon the record facts relating to petitioner's mental condition, the judgment of conviction for contempt was erroneous and should be reversed by this Court in the interests of justice. This feature of the case will be more suitably presented for this Court's determination after the presently unavailable materials deriving from the record of the narcotics trial (especially the medical exhibits) shall have been filed with the Court, as explained *supra*.

3. Most especially, this Court's powers in monitoring the proper administration of federal criminal justice should be exercised in this case to correct the injustice that has become manifest by reason of the events post-dating the conviction and sentencing of the petitioner for criminal contempt. We refer to the facts recited in our "Statement", *supra*, to the effect that petitioner, shortly after that conviction and sentence, was adjudicated and commited as a schizophrenic. As noted in the dissenting opinion of Circuit Judge Friendly in the court below (appendix *infra*,

p. 8a), these post-conviction facts were before the Court below, but they apparently did not avail to bring about the corrective which we are respectfully praying this Court to apply.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted, and that opportunity be reserved to petitioner to file an amended, substituted or supplemental petition as previously herein requested.

Respectfully submitted,

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APPENDIX A—Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 400—September Term, 1961.

(Argued July 17, 1962 Decided September 14, 1962.)

Docket No. 27667

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE PANICO,

Defendant-Appellant.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, sentencing appellant, a defendant in a narcotics prosecution, for contempt of court.

Affirmed.

Appendix A

JONATHAN L. ROSNER, Assistant United States Attorney for the Southern District of New York (Robert M. Morgenthau, U. S. Attorney and Sheldon H. Elsen and Arnold N. Enker, Asst. U. S. Attorneys, So. Dist. of New York, on the brief), *for appellee.*

JEROME LEWIS, New York, New York, *for defendant-appellant.*

SMITH, *Circuit Judge*:

This is an appeal from a judgment of contempt entered July 5, 1962 in the United States District Court for the Southern District of New York, by Judge MacMahon, upon a certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., sentencing the defendant to fifteen months to be served at the expiration of a sentence now being served in the State of New York and a sentence imposed by the State of Florida.

The actions of defendant which prompted the use of the contempt power occurred during a twelve week trial, upon an indictment charging twenty-nine defendants with violations of the federal narcotics laws. The first trial before Judge Levet ended in a mistrial when the foreman of the jury sustained injuries on the eve of summation at which time no alternate jurors remained. At the conclusion of said trial, and prior to the declaration of a mistrial, Judge Levet adjudged Galante and Mirra in contempt of court. *United States* v. *Galante,* 298 F. 2d 72 (2 Cir. 1962). An insight into the succession of delays and attempts to forestall a trial may best be gained by referring to some of the

related cases previously decided by this court. *United States* v. *Bentvena*, 288 F. 2d 442 (1961); *United States* v. *Galante, supra; United States* v. *DiPietro*, 302 F. 2d 612 (1962); *United States* v. *Bentvena*, decided July 20, 1962.

Appellant concedes, as indeed he must, that the conduct complained of was contemptuous on its face but argues that appellant "was too mentally ill to formulate the intent to be contumacious." In effect he urges that the actions were not intentional. Appellant also argues that he was not sane at the time of sentence and so the sentence is unlawful as an insane person may not be sentenced to imprisonment. With respect to defendant's claims of insanity the trial court concluded the following, as set out in the certificate:

> The court had him examined by a psychiatrist, took time out of this trial for three days, conducted psychiatric hearings, found him able, capable of understanding the trial, of standing trial. Despite that, he persisted in a course of conduct, faked a hanging attempt, attempted to slash his wrists but made absolutely sure that it did not kill him. There are seven cuts on each arm placed about an inch apart, a deliberate effort to make certain it wasn't effective.
>
> With that plus your repeated requests and a mandamus of the United States Court of Appeals, the Court directed a further examination of Panico. A psychiatrist examined him and found him sane in all respects. The Court takes notice of the fact that he is now an inmate at Sing Sing, serving two and a half years to five years, that he faces on top of that 18 months for

a conviction in Florida, and that there are charges against him pending in Bronx County as well as the charge for which he has just stood trial in this Court. Obviously it was to his advantage to break up this trial and to do everything in his power to inject prejudice in the record. The contempt sentence, however heavy, would be disproportionate to any sentence he might face here were he found guilty. His acts were wilful, deliberate, calculated to impede, obstruct, delay and abort this trial.

The Court takes judicial notice of the entire record before Judge Levet, of his behavior there, his good behavior there. The Court takes judicial notice of his behavior here prior to the incident of his jumping in the jury box and of the many conferences and sessions the Court had with him, with Mr. Todaro and with his other counsel, with you, Mr. Aronne, in attempts to arrange substitution for times when you couldn't be here. There is nothing insane about this man whatever. The Court so found it at the time. I so find it now.

Although the expert witnesses testified that Pancio was not malingering they were not present at the time of the incidents which prompted the summary conviction for contempt. Moreover, it is not at all clear that they did not mean only that he was not faking when he was examined by them. In any event, the court is not obliged to accept the conclusions of the experts. We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constitutes re-

versible error. *United States* v. *Galante, supra* at p. 75 and cases cited therein.

Perhaps more serious than the correctness of the determination with respect to defendant's calculated intentions is the propriety of making such a determination in a 42(a) proceeding when a substantial question has been raised which requires expert testimony. On the one hand is the need for the court to mete out swift punishment in order to preserve the integrity of the judicial system. The instant case is eloquent testimony as to the need to preserve order in the courtroom lest defendants be convicted unjustly and absent the safeguards of an orderly and impartial trial. Justice can be reached only in an atmosphere of order and dignity. There can be little doubt that the effectiveness of punishment as a deterrent is related not only to the quality of the possible punishment but to the certainty and promptness as well. Were we to require resort to the more lengthy procedures of 42(b) whenever the defendant raises a serious question of intention or "mens rea" we fear this would seriously undercut the power of the courts to punish for contempt. On the other hand the very nature of the power to punsh for contempt requires that the power be scrupulously circumscribed, *Brown* v. *United States,* 359 U. S. 41, 52 (1959), and 42(a) makes no provision for the taking of any testimony. But see *United States* v. *Galante, supra* at 77 (Friendly, *C.J.,* dissenting). Because testimony had been taken concerning appellant's sanity during the course of the trial, we do not reach the question of whether such testimony may be taken in connection with a 42(a) proceeding since the Judge is permitted to consider all things which took place during

the proceedings in connection with which the contempt arises. Particularly the defendant's intention inasmuch as the defendant's subjective state of mind is the primary focus of the inquiry, for contempt is, after all, an "intentional act committed in defiance of the authority and dignity of the court." 61 Col. Law Rev. 727 (1961).

If the issue before the court is considered to be the propriety of the trial court's deciding, in a 42(a) proceeding, a question of fact which by its very nature does not lend itself to determination merely by consideration of factors which impress themselves directly upon the sensory perceptions of the presiding judge the answer is the same. The question in the instant case did not relate to conduct which transpired beyond the presence of the court as in *United States* v. *Sacher*, 182 F. 2d 416 (2 Cir. 1950), cert. denied 341 U. S. 952 (1951). On the contrary, the inquiry was concerned with the subjective character of actions which did take place in the presence of the court.

The judgment is affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

My inability to join in affirming Salvatore Panico's sentence for contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure will not, I hope, be attributed to lack of appreciation of the problems experienced by the district judges in the trial and retrial of this difficult criminal case, to excessive naivete, or to failure to understand that government cannot permit "The interests of society in the preservation of courtroom control * * * to be frustrated through unchecked impropriе-

ties," *Sacher* v. *United States*, 343 U. S. 1, 8 (1952), on the part of criminal defendants. The issue on which I am forced to part company with my brothers is a much narrower one—whether this vital interest has here been vindicated in the manner required by Rule 42 of Criminal Procedure in its effort to reconcile the need of maintaining order in the courtroom with that of preserving fundamental individual rights.

Conceivably Congress could have deemed the interest in protecting the order and dignity of the courts to be so important as to authorize judges to punish certain acts even though the actor was ignorant of the character and quality of what he had done. No one asserts that Congress has done this. The conduct for which Salvatore Panico has been punished—quite justifiably if he knew what he was doing—is described in the Federal catalogue of crimes, 18 U. S. C. §301, and our criminal law normally "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong," Pound, Introduction to Sayre, Cases on Criminal Law (1927), quoted in *Morissette* v. *United States*, 342 U. S. 246, 250, fn. 4 (1952).

In the usual case there is no issue whether an alleged contemnor was capable of making the choice that he did —on this very appeal there was none as to the five defendants whose conviction we unanimously affirmed, *United States* v. *Bentvena*, decided July 20, 1962. As to Salvatore Panico there was. When I state there was such an issue, I would not be understood as saying that, in this exceptional area the mere making of a claim of lack of a "vicious will," 4 Bl. Comm. 21, suffices to create an issue on that

score as it normally does in a criminal case; F. R. Crim. Proc. 42(a) can well be construed as authorizing the judge, by analogy to F. R. Civ. Proc. 56(c), to disregard a claim of this sort that does not create a "genuine issue." Yet my brothers do not and, I think, could not say that, even with this qualification, no issue was created here, at least as to appellant's capacity to "choose" to invade the jury box and address the jurors on May 23 and to perform the incidents on the two following days, which must have been an important basis for the long sentence of 15 months' imprisonment. Dr. Arnett, a psychiatrist appointed by the Court, testified on May 25 that Salvatore had "developed a paranoid state with psychosis"; Dr. Hyslop, later appointed, admitted that the May 23 incident "could have been a hysterical display"; and Dr. Weiss, called by appellant, thought that Salvatore did not fully comprehend the courtroom proceedings. Despite all this it may well be that, as my brothers say, we could not properly upset the judge's conclusion, based on other testimony of the doctors and his own observation, that "There is nothing insane about this man whatever," and this despite the fact, communicated to us by counsel after the argument, that the psychiatrist at Sing Sing Prison and two others have now diagnosed Salvatore as schizophrenic—if the judge had power to come to any conclusion for the purpose here relevant. I think he did not.

The summary procedure authorized by F. R. Crim. Proc. 42(a) rests on the basis, as its words clearly imply, that "There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense," *Cooke* v. *United States,* 267 U. S. 517, 534 (1925). Although

Appendix A

Judge MacMahon "saw or heard" Salvatore's physical acts, he had not and could not have seen "the conduct constituting the contempt," when an essential element of that conduct was a "vicious will" and a substantial issue had been raised as to Salvatore's capacity to possess one.

Moreover, the judge's certificate itself demonstrates how far he depended on things he neither saw nor heard. He places emphasis, as my brothers seem to do, on the testimony of the psychiatrists concerning Salvatore's ability to stand trial; the very fact that he found it necessary to rely on such evidence seems to show his belief that something beyond what he saw or heard appellant do was essential to conviction here.[1] The judge also relied on what he considered the faked character of appellant's suicide attempts, acts which Judge MacMahon neither saw nor heard and which were not committed in his presence. True, he saw the cuts on appellant's arms, but these were only circumstantial evidence as to the character of an act

---

[1] Although I would reach the same conclusion if the facts were otherwise, it should be pointed out that the testimony of the psychiatrists was directed to an issue wholly different from that relevant to appellant's guilt of contempt. The testimony of Dr. Hyslop on May 29, and of Dr. Arnett on his second appearance, also on May 29, that Salvatore was then able to understand the nature of the charges against him (although Dr. Arnett had not thought him so when testifying on May 25), does not negate a conclusion that the paranoid state which Dr. Arnett identified on May 25 may have caused the outbursts antedating May 29 or even the ones postdating it. Dr. Arnett conceded, in his May 29 testimony, that psychotic episodes might recur. Moreover, as is well known, in paranoia, "Falsification of reality is restricted to misinterpreting events; what happens is correctly perceived, but peculiar inferences are drawn from it. Except for the delusional system, the patient is perfectly oriented and perfectly normal in his conduct. The personality does not become disorganized, and interest in the environment is substantially preserved," White, The Abnormal Personality (1948), 524.

outside his presence, and I can find no satisfying distinction between his use of such evidence to support a conclusion as to a plan formulated by appellant with respect to action taken outside the court and the trial judge's use of conduct inside the courtroom as an evidentiary basis for inferring an agreement made outside it, which a majority of this Court, in *United States* v. *Sacher*, 182 F. 2d 416, 455, 464 (2 Cir. 1950), held an impermissible case for proceeding under F. R. Crim. Proc. 42(a).[2] Since the certificate thus rested in part on findings not permitted to be made pursuant to Rule 42(a), we would be obliged at least to remand on this score alone. However, for reasons previously stated, I am convinced that no valid conviction under Rule 42(a) can be made in this case.

Perhaps I should emphasize that, as in *Offutt* v. *United States*, 348 U. S. 11 (1954), the consequence of the view taken in this opinion is the not very calamitous one that appellant shall be prosecuted, not under Rule 42(a), but under Rule 42(b), which requires notice, hearing and in this case, unless he consents, the participation of another judge. On the facts here, where there is indeed much to suggest a deliberate attempt to thwart a verdict and consequent likelihood that a trial under Rule 42(b) will yield no different result, reversal to that end may seem a useless formalism, especially when, if we should affirm appellant's sentence on the narcotics charge on which he was tried and convicted, the 15 months' sentence for contempt, sandwiched between his existing New York and Florida sen-

[2] The record also contains other evidence as to appellant's suicide attempts; it is hard to believe the judge performed the feat of putting this out of his mind and relying only on what he saw and heard.

tences and his new Federal sentence, will have a minimal practical importance. But the protection here refused this not too attractive appellant may be of vital consequence to a worthier one on another day; procedural safeguards in the administration of criminal justice do not exist for the sole benefit of nice people.

I would reverse for appropriate action under Rule 42(b).[3]

[3] I have not dealt with a possible contention that Salvatore Panico offered nothing to show that he was under a paranoid psychosis on April 2 when, the Court having assigned counsel because the lawyer of Salvatore's choice was engaged in a New York criminal trial, Salvatore said, in the course of the impanelling of a jury, "Do these people know I don't have a lawyer? What is this, Russia? There is nobody representing me here." The sentences imposed by the judge on other defendants for incidents of a character similar to this make it plain that he would not have sentenced Salvatore to 15 months' imprisonment but for the much more serious incidents of May 23, 24 and 25. Although a remand could permit a sentence under Rule 42(a) limited to the April 2 incident, it would seem wiser that all the specifications be considered together under the Rule 42(b) procedure.

APPENDIX B—Judgment Appealed From

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of September, nineteen hundred and sixty-two.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM BENTVENA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment as to Salvatore Panico of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C—Statute and Rules

Title 18, United States Code.

Section 401—Power of Court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure

Rule 42—Criminal Contempt.

(a) Summary Disposition: A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing: A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time for the preparation of the defense, and shall state the

essential facts constituting the criminal contempt charged and described as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX D—Correspondence Re Petitioner's Mental Condition

THEODORE S. WEISS, M.D.
25 FIFTH AVENUE
NEW YORK 3, N. Y.

GRAMERCY 7-8255

June 14, 1962

Mr. Albert C. Aronne
Counselor At Law
186 Joralemon Street
Brooklyn 1, New York

Dear Mr. Aronne:

This is to certify that I examined Salvatore Panico on May 29, 1962. After a long interview and psychiatric examination, I came to the following conclusion, namely, that he was suffering from a Psychosis of the Paranoid Type, that the paranoid ideas were fixed, but reactive in character, meaning that they were most probably a reaction to the tensions of the courtroom procedures and the situation he found himself in. He had definite ideas of reference, persecutory ideas, and intermittent auditory hallucinations. His affect was tense, agitated at times, and depressed, and probably suicidal.

After my examination, I testified the same day in Federal Court, Southern District of New York. My examination of this prisoner was read in large part at the sanity hearing and I gave the diagnosis in the courtroom as stated

above. Subsequently, I was informed by you that he was held in restraints by various restraining agents while in the courtroom. On June 7 and June 8, 1962, he made two apparently serious suicidal attempts while held in the Federal Detention on West Street, in Manhattan. In the first attempt, on the 7th, he had to be cut down in an attempt to hang himself; the next day, on the 8th, he slashed his arm which necessitated, I understand, about 50 sutures.

In view of his conduct and the increasing tension he has been under in the courtroom since my examination, I feel definitely that the psychosis is severe and deepening in character. In my opinion, he cannot adequately confer with counsel for his own defense.

Very truly yours,

/s/ Theodore S. Weiss, M.D.
Theodore S. Weiss, M.D.

w/f
Qualified Psychiatrist
New York City

Appendix D—Correspondence Re Petitioner's Mental Condition

JEROME LEWIS
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, 1, N. Y.

TRIANGLE 5-1882

July 20, 1962

Hon. Daniel C. Fusaro
United States Court of Appeals
Foley Square, New York

Re: U.S.A. v. Bentevena, et al.

Dear Mr. Fusaro:

I represent Salvatore Panico, one of the appellants in the above appeal.

On July 18th, I visited Salvatore Panico at Sing Sing Prison and learned that he had eaten but one meal during the week of his incarceration; that he was confined to a cell under constant guard; that he was being attended to by the prison psychiatrist and medical officer.

On July 19th, I phoned Dr. Bruckman, who is the psychiatrist at Sing Sing and spoke with him. He told me that Panico was schizophrenic; that he agreed with the diagnosis of Dr. Weiss; that he has recommended that Panico be transferred to Dannemora, which is the mental institution for the criminally insane

It is my sincere belief that the above facts are extremely relevant in the adjudication of the above appeal.

Very truly yours,

/s/ JEROME LEWIS

Distributed to Judge Moore
Friendly
Smith 7/20/62

Appendix D—Correspondence Re Petitioner's Mental Condition

JEROME LEWIS
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, 1, N. Y.

TRIANGLE 5-1882

August 28, 1962

A. Daniel Fusaro
Clerk-U. S. Court of Appeals
Foley Square, New York

Re: U.S.A. v. Panico
Docket No. 27667

Dear Mr. Fusaro:

This is to supplement the letter that I forwarded to your office in which I advised you that two days after Salvatore Panico had been sentenced by Judge MacMahon, he was examined by the psychiatrist at Sing Sing Prison and was found to be schizophrenic.

Subsequent examinations by two state appointed psychiatrists confirmed this diagnosis and by order of the County Judge of Westchester County, Panico was committed to the Dannemora State Hospital.

The enclosed photostatic copies show that Panico was committed on August 22, 1962.

My sincerest thanks for your cooperation.

Very truly yours,

/s/ JEROME LEWIS

JL/JG
encls.
Distributed to LPM
8/29/62 HJF
JJS
EK

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
SING SING PRISON
OSSINNING, N. Y.

WILFRED L. DENNO
[SEAL]
WARDEN

August 13, 1962

Mr. Frank Panico
251 Bay 41st Street
Brooklyn, New York

RE: SALVATORE PANICO—#129-446

Dear Sir:

The above named inmate, your brother, having been certified by two physicians as being mentally ill, a petition will be made in Westchester County Court, Westchester County, White Plains, New York, on August 17, 1962, for his commitment to the Dannemora State Hospital, Dannemora, New York.

I am enclosing herewith copy of the Petition.

Very truly yours,

/s/ L. J. KELLY
Acting Warden

LJK:A:dp
Encl.

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DANNEMORA STATE HOSPITAL

[SEAL]
R. E. HEROLD, M. D.
ACTING SUPERINTENDENT

Dannemora, N. Y.
August 23, 1962

Mrs. Raffaela Panico
1474 86th Street
Brooklyn, New York

Re: SALVATORE PANICO #7171
D. C. I. #560624X

Dear Madam:

Your son, Salvatore Panico #7171 was admitted to this hospital because of mental illness on August 22, 1962. Though it is too early to evaluate the progress he will make, it is frequently necessary for patients to have special types of treatments to facilitate their recovery. One very useful type of treatment is Electric Shock Therapy, with which you may be familiar.

In order to avoid delay, should it be advisable to give this treatment to him, I am enclosing a permission blank for this treatment. If you will sign it in ink and have your signature witnessed by any person over 21 years of age, we can proceed with the treatment, if it should be necessary. Though there is a small element of danger in ad-

ministering the treatment, the benefits derived far outweigh this.

Please be assured of our earnest desire to do everything possible to hasten his recovery. I wish to thank you for your kind cooperation in this matter.

Very truly yours,

/s/ R. E. HEROLD
Acting Superintendent

REH:cc
Encls.

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION

SING SING PRISON
OSSINNING, N. Y.

WILFRED L. DENNO
[SEAL]
WARDEN

August 24, 1962

Mr. Jerome Lewis
Attorney at Law
66 Court Street
Brooklyn, New York

RE: SALVATORE PANICO—#129-446

Dear Sir:

This is to advise that the above named inmate, your client, was transferred to the Dannemora State Hospital, Dannemora, New York, on August 22, 1962.

Very truly yours,

/s/ L. J. KELLY
Acting Warden

LJK:A:dp

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CITATIONS

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United States v. *DiPietro*, 302 F. 2d 612 — 4, 16

United States v. *Galante*, 298 F. 2d 72 — 4, 16

Statute and rule:

New York Correction Law, Section 383 — 21

Rule 42, F.R. Crim. P. — 2–3, 16, 19, 20

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 633

SALVATORE PANICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 308 F. 2d 125.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1962. A petition for rehearing was denied on October 3, 1962. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 2, 1962. The petition for a writ of certiorari was filed on December 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after the trial court had determined on substantial evidence that petitioner was mentally competent, it could properly find in a summary proceeding that he was guilty of contempt in the presence of the court.

RULE INVOLVED

Rule 42, F.R. Crim. P., provides as follows:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of

a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner and twelve codefendants were convicted in the United States District Court for the Southern District of New York of narcotics offenses and conspiracy. Petitioner was sentenced to imprisonment for twenty years. At the conclusion of the trial, the court, pursuant to Rule 42(a) of the Criminal Rules, summarily found petitioner and ten codefendants guilty of contempt in the presence of the court. Petitioner was sentenced on this charge to imprisonment for a period of eighteen months, to be served prior to the sentence on the indictment but after the expiration of (i) a sentence of 2½ years to 5 years imposed by a New York court (which he is currently serving) and (ii) a sentence of 18 months imposed by a Florida court. The court of appeals affirmed the conviction for contempt, Judge Friendly dissenting (Pet. App. 2a–11a; 308 F. 2d 125).[1]

The incidents which form the basis of the contempt citation occurred at the second trial under the indictment. During the first trial, frequent delays resulting from the claimed illnesses of various defendants and their counsel led the trial court to revoke bail and

[1] The court of appeals has not decided the appeals from the convictions under the indictment. The full transcript is before the court in that proceeding.

remand all defendants into custody. See *United States* v. *Bentvena*, 288 F. 2d 442, 446 (C.A. 2), and opinion of Mr. Justice Harlan, as Circuit Judge, *Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 683.[2] After five and one-half months, a mistrial was declared on the eve of the summations because a juror had been injured in an accident and all alternates had been exhausted. Thereafter, various defendants were summarily held guilty of contempt and sentenced to twenty days' imprisonment. On appeal, it was held that the question had become moot as to those defendants who had already served their sentences and, as to the others, that their sentences should be affirmed. *United States* v. *Galante*, 298 F. 2d 72.

At the outset of the second trial, District Judge MacMahon warned defendants that misconduct would not be tolerated. Nonetheless, the trial was repeatedly disrupted, with the result that, upon the government's motion, bail was again revoked and the defendants again remanded into custody . *United States* v. *DiPietro*, 302 F. 2d 612, 613. The granting of the motion was affirmed by the court of appeals, which took into account the previous history of the case and "the enormous stake of the Government and the defendants that the instant trial, unlike its predecessor, should proceed without interruption to a conclusion." *United States* v. *DiPietro, supra*, 302 F. 2d at 614.

At the end of the second trial, several defendants were again summarily convicted of contempt. Ap-

[2] The court of appeals observed that the trial judge "may well have detected a general pattern of conduct not attributable to less than all of the defendants."

peals by those other than petitioner were affirmed or dismissed in *United States* v. *Bentvena,* 304 F. 2d 883. A petition for a writ of certiorari filed by co-defendant Mirra was denied. 371 U.S. 927.

The incidents on which the finding of contempt was based are set forth in the certificate of the trial judge (designated herein as "C). The pertinent facts may be summarized as follows:

1. The alleged difficulty of obtaining counsel, one of the factors which had caused disruption of the first trial (see *United States* v. *Bentvena,* 288 F. 2d 442, 445), was again asserted by numerous defendants at the retrial, resulting in its repeated adjournment between June 19, 1961, and March 1962. On March 9, all defendants had counsel and the case was set for trial on March 19, 1962. On March 12, Mr. Albert C. Aronne appeared for petitioner at a pre-trial conference and stated to the court that his previous appearances had been only for the purpose of answering the trial calendar until such time as petitioner could retain Mr. Jerome Lewis, who had represented him at the first trial. Mr. Aronne then asked leave to withdraw, stating further that he had received no fee, had acted solely out of long friendship with petitioner, and knew nothing of practice in the federal courts. After ascertaining from Mr. Aronne that he had been admitted to the bar in 1952 and that approximately half of his practice was criminal, the court denied the request. Upon learning that Mr. Aronne was not a member of the bar of the district court, the court forthwith admitted him (S.A. 1–5).

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At that point petitioner, granted leave to be heard, confirmed that he had asked Mr. Aronne to appear for him only until he was in a financial position to retain Mr. Lewis; that he knew Mr. Aronne was unfamiliar with federal practice and lacked the ability to handle his case; and that he wished additional time to get another lawyer (S.A. 6–7). The court answered that a request for substitution of another attorney would be granted at any time, but that the trial would not be delayed for that reason. It rejected as untimely a request by petitioner that another lawyer, perhaps one from Legal Aid, be assigned to him (S.A. 6–7).

On March 29, Mr. Aronne advised the court that he had been forced to go to trial in a state criminal case, but promised to obtain a substitute to represent petitioner during the first week of the instant trial, in which the testimony pertaining to petitioner and his brother (whom Mr. Aronne also represented) would be brief (S.A. 8–15). When Mr. Aronne failed to obtain a substitute, the court on April 2 appointed Mr. Todaro to represent the two Panicos and co-defendant Loicano. While a jury was being impaneled on that date the following exchange took place (C. 3–4):

> Defendant Salvatore Panico: Do these people know I don't have a lawyer? What is this, Russia? There is nobody representing me here.
>
> The Court: Sit down.
>
> Defendant Salvatore Panico: I got no lawyer here.

> The Court: Sit down. You have a lawyer. The Court has assigned an able lawyer to represent you.
>
> Defendant Salvatore Panico: He doesn't want to talk to me. I haven't paid him any money.
>
> The Court: Be quiet, please.

The next day, April 3, petitioner discussed with the court, calmly and coherently, the appointment of his new counsel, insisting that he did not wish to be represented by Mr. Todaro, but was eager, instead, to continue with Mr. Aronne (S.A. 16–17). The court explained that Mr. Todaro was an able and experienced counsel and that Mr. Aronne would return by the end of the week, at which time the vital stage of the case would be reached.

3. On May 23, at the conclusion of a recess, and as the judge ascended the bench, petitioner entered the jury box, walked the length of it, and, pushing the jurors in the front row, screamed (C. 4–5):

> Get out of here. The Judge has got me guilty. Big John, Joe B. they are the junk pushers, we're innocent. My brother and I, we haven't got anything to do with this thing. They have me in jail already. Do you understand me? They have us in jail for nothing. They got us in jail. Twenty years they want to give me. * * * Twenty years, for nothing. Ruined for life. For what? Ruined for life. For what?

Petitioner was taken from the courtroom, still screaming (C. 5).[3]

[3] This was followed by a similar outburst by petitioner's brother.

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On the following day, May 24, a witness identified co-defendant Anthony Mirra. The court said, "Let the record reflect he identified Mirra after he stood up." Mirra responded, "Let the record reflect he can't see over here." The court then directed that Mirra be removed from the courtroom (C. 5; see also government brief in opposition in *Mirra* v. *United States,* No. 389 Misc., this Term). After a colloquy between counsel and the court and a motion for a mistrial, petitioner joined in, "Let the record reflect he can see the good looking Carlie and the other punk there—the other good looking pushers there." Petitioner was likewise ordered removed from the courtroom, followed by additional motions for mistrial (C. 6–7).

On the next day, May 25, during the direct examination of a defense witness, petitioner interrupted, "DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him." This was followed by a motion for mistrial on behalf of DiPietro and, again, petitioner was removed from the courtroom (C. 7–8).

4. The same day, May 25, the court asked Dr. Vitold Arnett, a psychiatrist, to examine petitioner (S.A. 20–21). In the presence of counsel, Dr. Arnett informally reported to the court his conclusion that petitioner had developed a paranoid state with psychosis and was not capable at that point of undergoing trial. He noted, however, that petitioner had a history of relative stability, that his paranoic condition was acute and temporary, that he would recover rapidly if allowed a certain amount of rest and free-

dom from tension, and that his symptoms were not consistent with faking, although there was no certain method of excluding that possibility (S.A. 22–25, 28, 29).

On May 29, Mr. Maurice Edelbaum appeared as special counsel for petitioner to assist Mr. Aronne on the issue of petitioner's mental ability to stand trial. Dr. George H. Hyslop, a psychiatrist called by the court, testified, on the basis of two personal examinations (as well as material, furnished him by the court, regarding petitioner's conduct at the trial), that petitioner considered himself sane, denied any connection with narcotics, and complained that he was being unfairly treated and could not stand it much longer (S.A. 38–42). The doctor further stated that petitioner's speech and memory were clear and coherent, that he understood the charge and the testimony of the witnesses, and that he was able to discuss the facts with his lawyer (S.A. 42–45). On cross-examination by Mr. Edelbaum, Dr. Hyslop gave his opinion that petitioner was not malingering (S.A. 47). When informed by counsel of petitioner's invasion of the jury box during the trial, the witness stated that this incident, though perhaps an hysterical display, did not in itself warrant a determination of psychosis (S.A. 51).

Dr. Arnett testified, on the basis of a further examination that very morning, that petitioner's emotional tone had definitely changed; that he was now able to remember and describe events coherently and logically, to understand the charges and the testimony, and to communicate with counsel; and that he

no longer showed symptoms of paranoia, which, on the previous examination, may have been due to the fact that he had just been physically removed from the courtroom (S.A. 66–69).

On cross-examination, Dr. Arnett stated that on his previous examination he had seen no significant evidence of malingering; and that, during the week preceding that examination, petitioner had suffered loss of appetite, decline in weight, and increasingly frequent and severe headaches, but that these symptoms did not in themselves indicate a psychotic state (S.A. 69–73). The doctor attributed the symptoms to tensions engendered by the trial, and particularly to the fear of physical violence. Petitioner still showed this fear at the second examination, but was then able to identify its source—i.e., an alleged threat by DiPietro to strangle him (S.A. 74–76).

Dr. Theodore S. Weiss, a psychiatrist, testified on behalf of petitioner. Dr. Weiss, who had read some of the minutes, heard testimony as to the episodes which occurred, and examined petitioner that day for about an hour, testified that petitioner knew what the charges were, but did not fully comprehend the proceedings and could not properly assist counsel in the defense; that he suffered from a paranoid delusion that the trial was a frame-up, involving the Black Hand or a similar organization; and that the other prisoners were hostile to him and tampered with his food (S.A. 83–87). Dr. Weiss concluded that a combination of pressures, including the pending charges in this and another case, had led petitioner to a paranoid breakdown (S.A. 91).

Mr. Aronne testified that his client complained of severe headaches, usually sat with a morose expression on his face, and quite often sighed and appeared troubled (S.A. 95–97).

Before announcing its ruling, the court stated that petitioner had appeared entirely rational in his conversations in the robing room and had shown unusual alertness for the protection of his own rights; that he was clear and coherent both in speech and memory; that he thoroughly understood the nature of the charge and what the witnesses had said; and was able to discuss the facts with his lawyers with a reasonable degree of understanding. The court, therefore, on May 29, found that petitioner was able to stand trial (S.A. 99–100).

Petitioner's motion for a mistrial was denied. The court warned petitioner that, unless he refrained from these outbursts, he would be gagged (S.A. 100–104). When asked by the court whether he would prefer to have the place of his detention changed petitioner answered in the negative. The court denied petitioner's request to be admitted to bail on the ground that he was in the custody of the State of New York on another charge (S.A. 105–107).

5. The proceedings which ensued were marked by further outbursts:

On May 31, when a codefendant was identifying himself, petitioner interrupted to ask him when he was going to tell them that Galante was in the Apalachin meeting with all of the top "hoods" and that he had there received orders for all these narcotics pushers.

Later, after he had been gagged, petitioner stood up, slammed the table and pointed to Galante (C. 8–9).

On June 5, the court refused Mr. Aronne's request to withdraw to another room for consultation with petitioner. Petitioner interrupted to ask why, accused the court of creating the delay, and asked the judge if he was crazy (C. 12). On the same day, when the jury was out, petitioner refused to consult with Mr. Aronne, saying that he no longer wished him as counsel since he was on the other side (C. 12–13).

The following day, June 6, during a recess to permit consultation of defendants with their counsel, petitioner said he would speak to the judge directly because, having dismissed Aronne, he was now without counsel (C. 14). Later in the day, while a defense attorney was questioning a doctor who had examined a codefendant to determine his sanity, petitioner interrupted, "Hey, Judge, maybe he can tell you why you shake. Let him examine you, Judge." (C. 15). Still later, petitioner again asserted that he was acting as his own lawyer (C. 15–16).

6. There followed two attempts, pretended or real, by petitioner to take his own life. At about 1:50 a.m., June 7, 1962, a police lieutenant, having just checked the area in which petitioner shared a cell with his brother and a prisoner named Palmieri, heard a noise and, thirty seconds later, saw petitioner suspended by a belt from the overhead bars of his cell. Palmieri grasped petitioner's feet and lifted him, while the lieutenant loosened the belt from above. Petitioner's breathing appeared normal and there was no discoloration except a red mark on the left side of the

neck. Petitioner said, "I want to die, let me die." The lieutenant concluded that petitioner had stood on a chair and kicked it over, making the noise which he heard. Thereafter, petitioner conversed coherently and had the full use of his faculties (S.A. 110–111). Petitioner had written a note, alleging, in explanation of his ostensible suicide attempt, that the judge and district attorney knew he and his brother were innocent; that petitioner thought himself sane, but was no longer sure; that he had unbearable pains in his head and kept forgetting what was happening; that the judge had separated them from the other men and they were treated like rats; that he dreamed some of the defendants were chasing him with knives and guns; that he could no longer stand it and must kill himself; and that he hoped his life and this letter would help others unjustly accused (S.A. 111–112). The chief medical officer at the detention headquarters wrote the assistant United States attorney, later that morning, that he found no physical trauma and that petitioner was able to attend court (S.A. 115). Still later that day, petitioner complained during a recess that he was dying, but the court denied Mr. Aronne's request that he be examined (C. 16).

On June 8, according to the report of the warden of the detention headquarters, an officer heard shouts coming from the shower room and, upon entering, found petitioner lying on the floor, both arms slashed and bleeding profusely. He was moaning and saying, "Let me die." Although the hospital report showed fourteen lacerations, requiring upwards of fifty sutures, it described petitioner's condition as good, and

made no recommendation other than that he be observed for signs of infection (S.A. 113–114).

There were further outbursts by petitioner on June 14, when he insisted that he wanted to mount the bench, and on June 15, when petitioner insisted that he wanted to get on the stand (C. 17–18). On June 14, Dr. Weiss wrote a letter to Mr. Aronne, stating his opinion, on the basis of his earlier examination of petitioner and upon the accounts of his alleged suicide attempts, that petitioner was not able adequately to confer with counsel for his defense (S.A. 108–109).

7. On June 18, Judge MacMahon wrote to Dr. Hyslop requesting that he examine petitioner again and respond to seven specific questions as to his ability to stand trial. These questions were answered in a detailed report, dated June 19, which gave an account of two further interviews with petitioner. At the first interview, petitioner had complained of a severe headache and nausea and, throughout the entire session, had been irritable, querulous and unfriendly. The doctor concluded, however, that petitioner was fully oriented and was maintaining the manifest attitude of being an unjustly treated person. At a second interview, the next day, petitioner, as he entered the room, made a lunge in the doctor's direction, used profanity, picked up a chair and held it menacingly over his head, and, finally, offered little resistance when the marshals forced him to drop the chair. Dr. Hyslop testified, however, on the basis of his professional knowledge of and experience with attempted assaults, that petitioner's purported hostility was entirely feigned (S.A. 121–131). With respect to

the second ostensible suicide attempt, the doctor noted that the lacerations on petitioner's forearms were evenly spaced and symmetrically arranged, and that his loss of blood, estimated at 200 cc, had been considerably less than the 500 cc customarily given in a blood transfusion, after which the donor usually goes about his business. He further noted the petitioner's assertions that he feared being killed by his codefendants were inconsistent with his desire to be removed from separate confinement and allowed to circulate with the other prisoners.

In reply to the specific questions asked by the judge, the doctor concluded that petitioner was able to understand the substance of the charge and the witnesses' testimony, to discuss the facts with counsel in a rational way, to communicate with clear and coherent speech, to remember events clearly, to recognize the nature and quality of his acts, and to distinguish between right and wrong (S.A. 133–134). After submitting this report to counsel, the court denied a request that petitioner be sent to Bellevue Hospital for a period of several days for examination, and denied a request for a severance (S.A. 137–140).

8. On July 5, the court executed its certificate finding petitioner guilty of contempt. The court stated that petitioner's conduct had been the most outrageous that had ever taken place in any courtroom anywhere, at any time; that petitioner had persisted throughout the trial in willful, disorderly, contemptuous disruptions and delay, impeding the conduct of the trial; that psychiatric hearings had been held for three days, after which the court found

petitioner capable of standing trial; that petitioner had thereafter faked a hanging attempt and, in slashing his wrists, made absolutely certain that the lacerations would not be fatal by spacing them approximately one inch apart; and that it was obviously to petitioner's advantage to break up the trial and do everything within his power to inject prejudice into the record, since, no matter how heavy the sentence might be for contempt, it would be insignificant compared to the sentence imposed if he were found guilty of the charges (C. 19–20).

ARGUMENT

The sustained, concerted and outrageous efforts of the defendants to disrupt the trial of this case have already been noted in prior opinions dealing with the revocation of bail and the contempt convictions of petitioner's codefendants. *United States* v. *Di Pietro,* 302 F. 2d 612; *United States* v. *Galante,* 298 F. 2d 72; *United States* v. *Bentvena,* 288 F. 2d 442. Petitioner apparently conceded below (Pet. App. 3a), and does not deny here, that his conduct was contemptuous on its face. He argues, rather, that he lacked the mental capacity to form the requisite criminal intent; that he was insane at the time of sentencing, thus vitiating the sentence; and that, in any case, the issue of *mens rea* should have been tried out under the Rule 42(b) procedure, rather than determined summarily under Rule 42(a). These contentions, we submit, are without merit and raise no issue warranting review by this Court.

1. The court's conclusion that petitioner's conduct was "willful, deliberate, calculated to impede, obstruct,

delay and abort this trial" (C. 20), and not the product of insanity, was justified both by the court's observation of the offending behavior itself and by the psychiatric testimony. One of the principal techniques employed by the defendants in their effort to obstruct the original trial, and later the retrial, was the allegation that they were having difficulties in obtaining counsel. The record shows that petitioner joined in the use of this delaying tactic before any question as to his mental competency had even arisen. Shortly before trial, Mr. Aronne, who had appeared generally for the petitioner over a period of months, attempted to withdraw on the ground that his appearance was limited to answering the calendar until the petitioner could retain Mr. Jerome Lewis, that he was inexperienced in federal practice, and indeed had never been admitted to the federal bar. Petitioner at that point personally addressed the court, explaining in lucid fashion the alleged circumstances of Mr. Aronne's employment, declaring that Mr. Aronne was incompetent to handle his case, and requesting that another attorney be appointed to replace him—a request which, in the court's view, came too late. On April 2, however, on the eve of the trial, after Mr. Aronne had notified the court a State court trial would prevent his appearance during the early stage of the trial here, the court complied with petitioner's earlier request by appointing Mr. Todaro (who had participated in the first trial) to fill the breach. Abandoning the lucidity which had characterized his appearance in chambers only a few weeks earlier, petitioner exploded with the first of his courtroom outbursts, shouting that he

was being deprived of counsel. The dissenting judge below conceded that nothing in the record suggested an excuse for petitioner's contemptuous behavior on April 2. Petitioner's subsequent conduct, particularly in light of the parallel action of his codefendants, reasonably appeared to the court as a deliberate continuation of his efforts to bring the trial to a halt. And this conclusion was reinforced by the fact that not only petitioner, but his codefendants as well, endeavored to capitalize on each occurrence as a means of obtaining a mistrial.

The judge, however, did not rely solely upon the normal inferences from petitioner's conduct. Instead, the matter of petitioner's mental competence was thoroughly explored by expert psychiatric examination and testimony in the course of the trial. Although the specific purpose of these examinations was to determine petitioner's ability to stand trial, the inquiry was equally germane to the question whether he was legally responsible for his conduct during the trial. The testimony of the two court-appointed psychiatrists, Dr. Arnett and Dr. Hyslop, on May 29 (*supra*, pp. 9–10), and particularly Dr. Hyslop's subsequent report of June 19, (*supra*, pp. 14–15), plainly justified the court's conclusion that petitioner was competent, that his suicide attempts were feigned, and that his contemptuous conduct was willful and deliberate.

The same psychiatric testimony also refutes petitioner's contention that he was insane at the time of his sentencing (Pet. App. 3a). The date of the sentencing was June 26, 1962, exactly one week after Dr. Hyslop

reported to the court that petitioner was fully oriented and able to understand the nature of the charge against him, to recognize the character and quality of his acts, to communicate clearly and coherently, and to distinguish between right and wrong (Pet. 15).

2. There remains the question whether, under the circumstances of this case, the court properly invoked the summary contempt procedure of Rule 42 (a), or whether the presence of the scienter issue required resort to the more elaborate procedure outlined in Rule 42(b). On its face, Section 42(a) seems plainly applicable, for the conduct held to be contemptuous here was committed entirely "in the actual presence of the court." Moreover, the fact that an important issue of scienter is presented is not in itself enough to render the summary procedure unavailable, for the question of *mens rea*—the subjective purpose and intent which underlies the defendant's observed speech and behavior—is likely to be a central element of many, if not most, contempt cases. In the present case, to be sure, the issue is not merely one of intent, but rather of mental capacity, a more basic question which—here, as in most other cases—requires consideration of events and circumstances outside the four walls of the courtroom. We readily concede that in all such cases the defendant must be given a full opportunity to prove, by psychiatric and other testimony, that he lacked the capacity to form the requisite criminal intent; it would be quite improper for a court to punish him for contempt without according him a hearing on that issue. No such action, however, was taken here. Nor is the Court called upon to con-

sider whether the detailed procedures of Rule 42(b) would become mandatory in a case in which the issue of mental competency had not been raised in connection with the trial itself, so that a *de novo* hearing would plainly be required before he could be convicted of contempt. This is not such a case. Here, the petitioner was given every opportunity at the trial itself to present proof that he was not competent to be tried, proof which might also have established that he was not responsible for his outrageous conduct during the trial. A qualified psychiatrist testified on petitioner's behalf; and two other psychiatrists, both appointed by the court, also gave evidence as to his mental condition during the critical period in question. On the basis of this testimony, together with his own personal observation, the judge reasonably concluded that the petitioner was competent to be tried. Precisely the same evidence supported the further conclusion that petitioner was capable of harboring the requisite criminal intent and hence was legally responsible for the conduct held to be contemptuous. Under these circumstances, we submit, the protection of the defendant's rights requires no departure from the literal terms of Rule 42(a), which clearly authorize the summary procedure utilized here. On the contrary, to require the same psychiatric testimony to be repeated in a subsequent proceeding either before the same judge, or before a different judge who lacks the benefit of having personally observed petitioner's courtroom demonstrations, would unnecessarily impair the policy of swift punishment for disruptive courtroom conduct which underlies Rule 42(a).

3. Petitioner relies upon proceedings, subsequent to his contempt conviction, whereby he was transferred from Sing Sing to Dannemora State Hospital as a schizophrenic, having been diagnosed as such by two state-appointed psychiatrists and by the psychiatrist at the prison. Such proceedings, under Section 383 of the New York Correction Law, do not, however, constitute an adjudication of insanity. *Trust Co. of America* v. *State Safe Deposit Co.,* 109 App. Div. 665, 96 N.Y.S. 585, affirmed, 187 N.Y. 178, 79 N.E. 996; *In re Stephani's Will,* 250 App Div. 253, 294 N.Y.S. 624. In any case, these post-conviction events do not appear in the record here; the government was not a party to the transfer proceedings; and we have had no opportunity to inquire into the circumstances which surrounded them. Accordingly, we submit that these events should be given no weight in the Court's deliberation here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963

In the Supreme Court of the United States

OCTOBER TERM, 1962

SALVATORE PANICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENT TO GOVERNMENT'S BRIEF IN OPPOSITION

Up to now it has been impossible, because of the pendency in the Second Circuit of the appeal from the main conviction on narcotics charges, to place before this Court the complete transcript of the trial during which the petitioner committed the acts of contempt involved here. This difficulty was explained in detail in the petition for a writ of certiorari (Pet. 4–8). Although petitioner conceded that the records initially submitted were inadequate and stated his intention to file the complete transcript following the argument in the court of appeals during the week of January 28, 1963 (Pet. 7), petitioner has in fact filed only a supplemental appendix relating to the matter of his mental competency. And since the government had already requested and been

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granted two extensions because of the inadequacy of the record submitted, it undertook to answer the petition on the basis of the record before the Court, referring only generally to the conduct of the other defendants as reflected in published opinions.

The full transcript has now become available and we have lodged it with the Clerk of this Court. It is, we believe, relevant to petitioner's contention that the issue of his contempt should have been adjudicated under the procedure prescribed by Rule 42(b), F.R. Crim. P. Petitioner's behavior was not an isolated phenomenon; it was part of a larger pattern of obstructive efforts in which his codefendants, whose summary convictions for contempt have been affirmed, were also participants. The purpose of this supplement is to point out briefly how petitioner's conduct, set forth in more detail in the government's principal brief in opposition, paralleled the conduct of his co-defendants.

1. Efforts to prevent or terminate trial because of lack of counsel

After the declaration of mistrial which terminated the original proceeding, five defendants claimed to be unable to obtain counsel.[1] Though cited for contempt they were found not guilty because of the absence of precedent for such an action. Rather than encounter further delays on this account, the govern-

[1] Lack of counsel had resulted in defendant Sancinella's obtaining a severance during the first trial. *United States* v. *Bentvena*, 288 F. 2d 442, 445–446 (C.A. 2).

ment obtained a severance as to these defendants (matter sealed by the trial court, pp. 173–174).[2]

Various other difficulties arose as to lack of counsel or attempted withdrawal of counsel immediately before the second trial (pre-trial transcript 18–20, 34, 36–37, 598–620). As noted in the brief in opposition, petitioner himself made an appeal to the court in support of the request by his counsel, Mr. Aronne, to withdraw just before trial and, during the impaneling of the jury, shouted that he had no lawyer and demanded to know if this were Russia (C. 3–4). A few minutes after petitioner's demonstration, defendant Loicano, for whom the same attorney—Mr. Todaro—had been appointed by Judge MacMahon, stated before the panel that Mr. Todaro did not represent him, and so reasserted after the court corrected him (Tr. 70). Counsel had been appointed for Loicano because his retained attorney, Mr. Cosentino, was in the hospital on the day of trial. A few days later Mr. Cosentino appeared in court but asked to withdraw for various reasons connected with the interim representation of his client (Tr. 1715–1717). Mr. Cosentino admitted that he had discussed his heart condition with the court before the trial commenced, that

[2] At the outset of this trial, the Assistant United States Attorney moved that all defendants be remanded to custody, and brought certain matters to the attention of the court in chambers. The record relating to these matters was sealed in order to avoid publicity which might affect the fairness of the trial.

he had made a number of applications for adjournment on that ground during the first trial, and that Loicano was familiar with the condition but had nevertheless insisted upon his remaining in the case. Judge MacMahon declared that he would accept substitution of another attorney, with Loicano's consent, but otherwise could not accept the withdrawal (Tr. 1719–1725).[3]

Difficulties were also encountered with regard to the representation of co-defendant Galante. Prior to trial the court permitted Galante's retained counsel, Mr. Iannuzzi, to absent himself while another attorney, Miss Kahn, represented Galante, but only upon Iannuzzi's express promise that he would come any time Miss Kahn could not be present (Tr. 55). However, when Miss Kahn, claiming to have been injured, went to the hospital, Iannuzzi was willing to appear on Galante's behalf only under threat of a contempt citation and continued his protests until he, too, went to the hospital with a claimed illness (Tr. 7415–7419, 7507–7509a, 7640–7642, 7682–7683, 7833–7837, 7863, 7869–7874). The court stated that it had ordered medical examinations of both Miss Kahn and Mr. Iannuzzi and that the doctors could not discover objective symptoms of any kind (Tr. 8083). Another attorney was appointed to represent Galante (Tr. 8092–8093).

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[3] The court made a copy of the transcript available and also offered to permit Mr. Cosentino to make an opening statement and to recall any witness for further cross examination (Tr. 1725–1727).

2. Efforts to terminate trial by statements prejudicial to co-defendants

It will be recalled that petitioner, during the trial, referred to some of his co-defendants as "junk pushers" (C. 4, Tr. 5638, 5889). Similarly, defendant Mirra, when asked upon cross-examination if he knew Loicano, replied "Mr. Rosner, believe me, I don't know any of them junk pushers, none of them." Later, asked if he knew Galante, Mirra said, "I don't know any of these guys. They are all dope pushers." As when petitioner used the same term against co-defendants, there were motions for a mistrial by the other defendants (Tr. 6434–6435).

3. Efforts to terminate trial by irrational conduct

The only other defendant who was alleged to be incompetent to stand trial was Frank Mari. He, too, it was claimed, was paranoid or schizophrenic and suffered persistent headaches. After hearing testimony by two psychiatrists named by the court and one called by this defendant, the court found him competent to be tried (pretrial transcript 418–578). A suggestion of incompetency was made as to petitioner's brother Carmine by Mr. Aronne, counsel for both Panicos, who told the court that, in his opinion, both were "a little balmy" (Tr. 5679).

Seemingly irrational behavior was, however, a pattern in the case. During the examination of government witness Smith, defendant Sciremammano interrupted to demand, "Why don't you tell the truth? Why don't you stop lying?" (Tr. 1481). Defendant

Struzzieri interrupted the same witness by shouting, "He is getting $5,000 more for lies today. Why don't you tell the truth, Smitty?" (Tr. 1558). And defendant Monastersky cried: "Smitty, your story is a little mixed up from last time, what did they promise you, $10,000 more this time?" (Tr. 1656–1657).

On another occasion, while Judge MacMahon and others were in the robing room, defendant Ormento broke away from the marshals, pounded on the door of the robing room and shouted obscenities. His attorney explained to the court that Ormento was in physical pain and that his words were intended for the Assistant United States Attorney, not for the judge (Tr. 3491–3494, sealed by the court).

After petitioner's outburst of May 23—in which he entered the jury box, shouting and pushing the jurors (C. 4–5, Tr. 5638–5640)—his brother Carmine joined in: "(To the Court) You think that he's all right. What you're doing, it is a shame, it ain't fair, to allow a frame. A lousy bum like that (Pointing to the Court.) A shame in your heart that you stand up there near the flag which I served for." As the marshals were escorting him from the courtroom, he pointed at Judge MacMahon and the prosecutor and said, "It is a dirty shame what you are doing, to ruin families, you bastards" (Tr. 5639). As in the case of other demonstrations during the trial, the court admonished the jury to disregard the episode. When the court prepared to dismiss the jury for the day, defendant Struzzieri interrupted, "[t]hat's right. Go ahead. Tell them. Disregard what Panico says and

everyone else." And, as the marshals were taking him from the room, Struzzieri added, "You must have been in the hospital" (Tr. 5809).

Another tactic adopted by various defendants was to appear to be asleep during the course of the trial. Defendant Mirra, according to his counsel, first attributed his somnolence to medication (Tr. 6496–6498, 6509), claimed he could not remember what the witness on the stand had said (Tr. 6511), and the following day declared that he was in a fog as a result of further medication (Tr. 6603–6604).[4] Shortly afterward, petitioner claimed not to understand what the witness had said, though he did not allege that he had been drugged (Tr. 6524). A few days later, defendant Monastersky complained of being groggy and unable to understand the proceedings because of medication (Tr. 7239–7240, 7375–7379). Later, the complaint was that he had not received medication and that his pain was so great that he could not intelligently follow the proceedings (Tr. 7838–7839).

On one of the occasions when petitioner called a codefendant a "dope pusher," the codefendant threatened to strangle him (Tr. 5889–5890). This threat was later repeated in the courtroom (Tr. 5893). On another occasion, defendant Mirra, angered at a question by the Assistant United States Attorney, stood up and hurled the witness chair at him (Tr. 6462–6464). See government's brief in opposition in ***Mirra***

[4] The detention center doctor later testified that the medication which Mirra had received would not have made him sleepy but would have made him more alert by relieving his distress (Tr. 9202, 9206, 9218, 9220).

v. *United States*, No. 389 Misc., this Term, certiorari denied, December 3, 1962.

4. Efforts to terminate the trial by acts of violence

In addition to the acts of violence which took place at the trial itself, other, much more serious, incidents involving persons associated with the trial occurred outside the courtroom. The information brought to the court's attention by the Assistant United States Attorney, and sealed by the court at the outset of the second trial (see fn. 2, p. 3, *supra*), pertained to happenings which took place after the events referred to in the decision of the court of appeals in *United States* v. *Bentvena*, 288 F. 2d 442, reviewed by Mr. Justice Harlan in *Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 682. One of the jurors, a Mrs. Bose, found ground glass in various utensils in her apartment and was excused. The sealed material also elaborated the circumstances surrounding the injury to the foreman of the jury which necessitated the termination of the first trial. See *United States* v. *De Pietro*, 302 F. 2d 612 (C.A. 2). Late on the night before summation, when all the alternates had been exhausted, the foreman of the jury was found at the bottom of a flight of steps leading in to the basement of an abandoned building, his back broken and suffering from a very severe brain concussion. The Assistant United States Attorney also stated to the court that about a month previously, on March 1, he had interviewed a Mrs. Rostelli, who had given him information about the activities of these defendants. Three days later, as she was coming home, she was

brutally murdered (sealed matter 175–177).[5] While we have no specific evidence that these acts of violence and brutality were causally related to the trial, the frequency with which they occurred strongly suggests that there may be a relationship.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

MARCH 1963.

[5] Two other incidents of violence, which may or may not be connected with the trial of this case, should be mentioned. One of the defense attorneys was "mugged" in the elevator of his apartment on the night before the last day of trial. He was struck across the face and feared injury to his lower front teeth, but appeared at court the following day (Tr. 8099–8102). The Assistant United States Attorney also reported, in connection with his motion early in the trial to remand all defendants, that one of the defendants had been killed between trials. He stated that he mentioned this only because one of the defendants had been injured in an automobile accident under suspicious circumstances during the first trial (sealed matter 174–175; see also *United States* v. *Bentvena*, 288 F. 2d at 446).

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IN THE

Supreme Court of the United States

October Term, 1962

No. 45

SALVATORE PANICO, *Petitioner*

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1962

No. 633

SALVATORE PANICO, *Petitioner*

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

I

This brief is filed in reply to both the Government's Brief in Opposition and the "Supplement" to that Brief.

At the outset we note that the "Supplement" to the Government's Brief in Opposition bears the sole signature of the Solicitor General himself. We are unfamiliar with the conventions of the Solicitor General's office in this respect, but if the Solicitor General's presentation of a brief to this Court bearing only his own signature carries a connotation of his special official concern in the particular

matter, then the instant petitioner is indeed put under an even heavier statistical disadvantage than ordinarily operates for the average run of certiorari applications in this Court.

Whether we are correct or not in our above suggestion that the Solicitor General may consider it exceptionally important to the Government that this particular petition for certiorari be denied, the treatment in the Government's two briefs opposing this petition is unusual in several respects and obliges us to submit this reply.

The main feature of the Government's two briefs to which we address ourselves is the factual theme that petitioner Salvatore Panico's own contempt case, and apparently even the question of his mental competency, are dispositively affected (adversely to petitioner) by the record of the conduct of his co-defendants in the narcotics trial. The Government's treatment of the facts as to the conduct of those other defendants is not free from serious factual flaws, some of which we note *infra*. However, our main and short reply to all of this collateral matter adduced by the Government is that if a hearing under Rule 42(b) were to result in an adjudication that Salvatore Panico could not entertain the requisite scienter to commit contempt by reason of his mental condition, no facts relating to other defendants would have any relevance. And, perhaps even more to the point, how can the question of the relevancy of the conduct of other defendants be judicially decided in the sort of cart-before-the-horse inquiry which the Government is asking this Court to make *via* the foreshortened avenue of a proceeding on petition for a writ of certiorari? The insuperable difficulties, not to say the sheer unfairness to

the petitioner, in resolving these questions in the manner which the Government proposes, are aggravated, moreover, by the prodigious size of the narcotics trial record.*

II

In our footnote, *supra*, we refer to the supplemental materials which we filed with the Clerk of this Court under cover of our letter of January 25, 1963. The sheer physical difficulties of the "record" in this case, as just mentioned, prompt us, both in our own interest and for the Court's convenience, to invite the Court's further attention to those supplemental items which we filed and to our purpose in doing so. There were three items: (1) extra copies of the contempt certificate of the Trial Judge (containing the contempt specifications); (2) nine copies of our printed supplemental appendix in the appeal from the narcotics conviction which is presently pending in the Court of Appeals for the Second Circuit; and (3) nine copies of our printed brief in the last-mentioned appeal. What we especially desire to bring to the Court's attention concerning these supplemental items is that at pages 6-42 of the Statement of Facts in the printed brief just referred to, and in Points II to V, inclusive (pp. 44-61) of that brief, there is extensive treatment of matters which are relevant to this petition for certiorari, with what we think are meticulous citations to

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* We owe the Court an explanation, if not an apology, concerning our not having filed the entire record of the narcotics trial. We thought, perhaps mistakenly, that the supplemental materials which we filed with the Clerk of this Court under cover of our letter of January 25, 1963, were adequate. Were it not for the Government's insistence that the entire trial record is needed—in order to evaluate the conduct of petitioner's co-defendants—we should still say that those supplemental materials which we filed are adequate.

the stenographic minutes of the narcotics trial; also, many of the more important portions of those trial minutes which are cited in our aforesaid printed brief in the Court of Appeals are set forth *in extenso* in the aforementioned printed supplemental appendix of which we have filed nine copies in this Court. In view of the Government's representations to this Court concerning various happenings in the trial of the narcotics case, and in view, once again, of the all-but prohibitive difficulties presented by the physical size of the trial record of that case, we earnestly request this Court to read the portions of our aforementioned printed brief in the Court of Appeals just referred to and to note our citations to the trial minutes which are contained in that brief. In making this emphasized request that this Court should take into consideration a brief filed in another proceeding—a document which we well realize is technically not "before" this Court—we are motivated, as above stated, by the earnest belief that the granting of this request would be both a convenience to the Court and an act of justice to the petitioner, and is something which is justified by the peculiarly difficult circumstances of physical access to the "record" in this case.

III

Among the factually flawed statements in the Government's two briefs to which we above alluded, are the following:

A. The Government's treatment of the imputed *mala fides* of the petitioner and various co-defendants in regard to their difficulty in obtaining counsel, classically illustrates, we submit in all sincere respectfulness, how even the very truest model of a busy Solicitor-General-of-good-will may

be led into simplistic recital of "facts". If this Court should hearken to our request that it read the copies of our printed brief in the Court of Appeals in the appeal from the narcotics conviction (filed with our supplemental materials herein as of January 25, 1963), it will discover the following items which apparently eluded the attention of the Solicitor General and his staff: (1) Several of petitioner's co-defendants in the narcotics trial whose difficulty in obtaining counsel the Government derides in its two briefs herein, had to make application to the variously-assigned Judges of the Southern District of New York, between the times of the first and second trials of the narcotics case, for assignment of counsel, applications which were granted (it must be presumed only after due judicial deliberation) *per* the assignment of attorneys of unimpeachable integrity from the Legal Aid Society and leading Wall Street law firms. (2) The understandable difficulty of obtaining *assigned* counsel for those co-defendants of petitioner—counsel who knew that they would face in advance the stern fact that they would perforce be "out of circulation" for a period of many weeks or months if they undertook the re-trial of this mass-conspiracy narcotics prosecution—was a prime, if not the decisive, factor in the delaying of the re-trial from June, 1961 to March-April, 1962. (3) In suddenly and peremptorily "assigning" Mr. Todaro, on the morning of April 2, 1962, as trial counsel for the petitioner in the narcotics trial, owing to the absence of petitioner's engaged counsel, Mr. Aronne, the Trial Court was doing the following things: It was refusing to acknowledge the fact that, by its utterly fictional declaration to counsel a few days previously that they were "actually engaged" in this trial, it had rendered petitioner's engaged counsel, Mr. Aronne, absolutely help-

less to forefend a supervening mandate by another court (which in fact happened) forcing him to trial in another case in which he was engaged as counsel. Mr. Todaro, the attorney who was "assigned" to take over Mr. Aronne's duties on the morning of April 2, 1962, was, figuratively, dragged into this "assignment" by the nape of his professional neck just as he was leaving the courtroom after having been displaced from the case by another defendant who had engaged substitute counsel; and Mr. Todaro knew nothing whatever about petitioner's case. Furthermore, Mr. Todaro was simultaneously "assigned" to serve as counsel for still another defendant, Loicano, whose interests in this trial were strongly antithetical to petitioner's interests. (4) During the absence of petitioner's counsel of his own choice (Mr. Aronne), and during the impasse of petitioner's declination (justified, as we maintain) to cooperate with his "assigned" counsel (Mr. Todaro), the trial proceedings encompassed the selection of the jury, the opening statements to the jury, and the entire testimony on the substantive counts of the indictment (involving defendants Bentvena and Struzzieri) which were vital to both the prosecution and the defense because the proof under those counts included the most inflammatory physical evidence in the case, namely, fearsome quantities of seized heroin—Bentvena and Struzzieri being named also in the conspiracy count of the indictment, under which petitioner was convicted in this narcotics trial. (5) The entire story of the difficulties or alleged difficulties of the petitioner's co-defendant Galante in regard to representation by counsel has been distressingly over-simplified by the Government. This issue of co-defendant Galante's denial of the right to counsel was extensively treated in his brief in the

pending appeal in the Court of Appeals for the Second Circuit from the conviction in the narcotics case. We are filing, together with this reply brief, the single copy of that brief which is presently in our hands, and we respectfully refer the Court to pages 14-26, and 40-48 of that brief of Galante so that the Court may at least have available to it some indication of the way in which the Government has telescoped this phase of the alleged conduct of petitioner's co-defendants as presenting an issue which supposedly affects petitioner's right to a writ of certiorari in the instant proceeding. (6) For reasons similar to those just mentioned as to Galante's difficulties with representation by counsel, i.e., to present the matter in a fairer light than is done in the Government's two briefs herein, we are filing with this reply brief the single copies presently available of the printed appendix (see pp. 3a-20a), the brief (see pp. 9-12) and the reply brief (see pp. 11-13) filed in the appeal in the narcotics case by petitioner's co-defendant Loicano.

B. The Government's two briefs opposing the writ herein may be read in vain for any indication of, or merest clue to, the fact that a prime, if not the principal, issue in the presently pending appeal from the narcotics conviction in the Court of Appeals is the issue of fair trial which arises from the extraordinary conduct of Trial Judge MacMahon in that narcotics trial. Again, should this Court see fit to examine the copies of our printed brief in the pending appeal in the Second Circuit, it will have what we believe is an objective portrayal of a species of conduct by a Federal District Judge which may well be without precedent, for intemperateness and insupportable provocativeness towards defendants and defense attorneys, since the days of the ill-

omened Circuit Judge Chase during the period of enforcement of the Alien and Sedition Laws of the administration of the first President Adams. Our printed brief in the Court of Appeals filed herein, which we are hoping that this Court will examine, points out, for example, the following: (1) On the day after petitioner's major outburst (May 23, 1962) the following occurred (we quote from our said printed brief at pages 31-32):

> "The next day, at the outset of the session, the Court said that Salvatore's outburst was 'planted' (5664), and the Court derided the statement of one of the other defense attorneys that 'we were shocked' (5664). A few moments later the Court all but directly accused the Panicos' attorney of having staged the outburst—'I want an affidavit from you, Mr. Aronne, on my bench by tomorrow morning telling me the reason why you requested coverage for yesterday and where you were' (5666); and see 5669, where Mr. Aronne protested to the Court that 'You are looking at me as though I precipitated this disturbance yesterday'. The Court's outraged feeling of being the victim of a plot by the entire defense, including the attorneys—among whom were assigned counsel from the Legal Aid Society and from leading Wall Street firms—took concrete form on that same day (May 24-1962) in a series of punitive and admonitory orders which the Court addressed to the assembled defense attorneys in the staccato manner of a punitive overseer prescribing corporal punishment to servile malefactors under his charge (5663 *et seq.*). For additional similar treatment meted out by the Court to defense attorneys following this Salvatore Panico episode, see 5793-5806, 5872, 5928-5932, 6156, 6161, 6074."

(2) After the petitioner had been initially examined by psychiatrists (May 25-May 29, 1962—see our aforesaid printed brief in the Court of Appeals at pages 32-36), the next ensuing events included (*id.*, 36-37):

> "Salvatore was brought back to the courtroom gagged and shackled (May 31); whereupon his brother Carmine said 'You better gag me too' to which the Court rejoined 'I will. Gag him too.' When Mr. Aronne pleaded with the Court that Carmine is 'emotionally upset because of his brother's condition' the Court's reply was 'That may be. He is going to be gagged' (6088-6091).
>
> From this point on the trial resembled more a series of intermittent scenes from Bedlam, than an American courtroom of justice. With the two Panico brothers sitting in the courtroom bound and gagged before the eyes of the jury, with Salvatore continuing to suffer his psychotic outbursts—in words, whenever the gag happened to be removed; by grotesque pantomine movements, while the gag was on him—there was from this point on, and there could be, no trial in any realistic sense of that word. Their necks and heads torn by the adhesive tape of the gags placed upon them on the first day of the gagging (6156—more 'comfortable' gags were later ordered by the Court), their bodies cramped by the ever-present shackles, and most important of course, their spirits crushed by the humiliation of wearing these regalia of bodily restraint, the Panico brothers were obliged to sit in this vile condition through the ensuing two weeks and more of this trial, day in and day out, because the Trial Court believed that Salvatore's conduct was part of a mass plot by the defendants and all of their attorneys to disrupt the trial."

(3) The Government's two briefs make no mention of the fact that Trial Judge MacMahon's renewal of the psychiatric examination of the petitioner following his two suicide attempts had to be compelled by a writ of mandamus from the Court of Appeals. (4) After those suicide attempts, and before the mandamus just mentioned, the following took place (as recited in our aforementioned printed brief at pp. 40-41):

> "On June 11, 1962, after the second suicide attempt (the razor-slashing), Salvatore's attorney pointed out to the Court that the defendant was in pain from the slashes on his bandaged arms, that there were tears streaming from his eyes, but the Court unyieldingly refused to interrupt the trial (7222, 7237-7238). The Court derided Salvatore's mental agonies ('mental condition, my eye'—7371).
>
> On that same day (June 11) a revealing incident in the trial exposing the Court's own emotional affect towards the Panicos (as towards all of the defendants), occurred when the Court spoke of the gags on the Panico defendants as 'muzzles'—an apt term to describe the condition of creatures who are being treated like dogs rather than human beings (7252). A little later that same day the Court's simplistic approach to the situation was again indicated when, in response to a new defense request to remove the gag from Carmine, the Court refused on the ground that he had seen Carmine 'looking daggers' at him (7317-7318, 7371-7373).
>
> On June 14, 1962, the Court refused to allow medicine to be given to Salvatore when his attorneys represented to the Court that he was feeling nauseous (7677, 7678). Shortly after this, when the gag was momentarily removed, he groaned incoherently 'MacMahon, I'll be dead,' whereupon (the record reads)

> 'the marshals immediately regagged the defendant Salvatore Panico,' the Court ordered 'Take him out', 'the defendant Salvatore Panico was removed from the courtroom, making muffled sounds through his gag', (7735-7736).
>
> On June 18, 1962, in response to defense requests for psychological treatment for Salvatore, whose condition was growing worse and worse, the Court announced its unique medical theory—which we paraphrase—that a claimed lunatic need not be medically examined for his claimed lunacy when the claimed lunatic 'refuses to cooperate' in the examination (8194)."

C. The Government's description of petitioner's second suicide attempt (by slashing his arms with a razor) omits the following on-the-spot report of the "Nursing Notes" from the Prison records, which are set forth in our supplemental appendix (of which nine copies have been filed in this Court), the item in question appearing in the form of a photo-offset which is the third such photo-offset sheet following p. 116a of said printed appendix:

> "Inmate was found writhing on floor in shower room on the second floor, covered with blood; in an emotionally disturbed, delirious and disoriented mental state. * * * "

This documentation was, of course, before Trial Judge MacMahon. Nevertheless, Judge MacMahon never relented from his conviction that the petitioner had 'faked' his suicide attempts.

IV

In the Government's discussion of the psychiatric testimony of Dr. Arnett—the Court-appointed physician who, upon examining petitioner on May 25, 1962, diagnosed him

to be incapable of standing trial at that juncture, but who later gave a different diagnosis after petitioner had had a chance to calm down for a few days—does not take into account that Dr. Arnett's diagnosis of May 25, 1962, being immediately close in time to the happenings in which petitioner committed his most egregious contemptuous misconduct, leaves standing on the record undisturbed and unallayed by any subsequent diagnostic situation, a sole and unchallenged medical diagnosis by a Court-appointed psychiatrist to the effect that the petitioner must indicatedly have been incapable of entertaining the legally requisite scienter to commit the single most outrageous of his allegedly contemptuous acts in this trial—this particular act of the petitioner, viz., his charging into the jury box with violent and verbally obscene manifestations, being the "bete noire" item in the entire catalogue of the petitioner's allegedly contemptuous performances.

V

The Government's suggestion (Br. in Opp. 21) that the post-conviction events of petitioner's having been diagnosed as schizophrenic "should be given no weight in the Court's deliberation here" because those events "do not appear in the record here", and because "the Government was not a party" to the adjudication proceedings involved (as to petitioner's sanity), and because "we [the Government] have had no opportunity to inquire into the circumstances which surrounded" those post-conviction events, is a suggestion which, at any rate, has not entered these proceedings under the sole signature of the Solicitor General himself (as is true of the "Supplement" to the Government's Brief in Op-

position). We had thought that it was made perfectly clear in our petition for certiorari (and its printed appendices) that the post-conviction events in question were expressly, and *documentarily*, before the Court of Appeals. We had thought that the unsatisfactory posture of the "record-filing" in this matter in the Court of Appeals, as set forth in detail in our petition for certiorari, would operate to deter both sides in this controversy from searching "with eagle's eyes" for technical advantages derivable from the posture of the "record". We had thought that in a case where the processes of law are being called upon to deal wisely and fairly with the at least colorable agonies of a human being afflicted by mental disease, the narrow metrical predilections of the adversary legal mind would be foreborne.

In any event, the documents establishing petitioner's post-conviction adjudication of insanity (the medical diagnosis therefor having first been made by the prison psychiatrist at Sing Sing just two days after petitioner's sentencing in the narcotics case) were undisputedly distributed to the Court below by the Clerk of that Court and are expressly referred to in Judge Friendly's dissenting opinion (see the appendices to our petition for certiorari herein). This being so, those documents are not improperly before this Court, whatever be thought to be their technical "record" posture at this moment. And, if the present record posture of those documents—whose importance is so manifest—does preclude their being taken into consideration by this Court in ruling on this petition for the full purposes of a grant or denial of certiorari, we respectfully suggest that for this very reason the Court might properly wish to entertain continuing jurisdiction by an order of remand which would direct that the contempt

trial proceedings be reopened for readjudication in the light of those documents and evidence relating thereto. Such an order of remand, we would hope, would direct that the reopened trial proceedings be conducted pursuant to Rule 42(b) (F. R. Cr. P.), but at the least the Rule 42(a) proceeding itself should be reopened for this purpose.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our petition for certiorari, together with the supporting documents filed in support thereof, it is respectfully submitted that the petition for a writ of certiorari should be granted; or, in the alternative, that an order of remand as requested in our last preceding paragraph herein be granted.

Respectfully submitted,

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